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The Law of the Sea

I. Restatement (Third) and the U.N. Convention on the Law of the Sea, 1982

The American Law Institute's Official Draft of the Restatement (Third) of the Foreign Relations Law of the United States was published in 1987, twenty-two years after the publication of its immediate predecessor[1] and almost ten years after the inception of the so-called "Foreign Relations Project" by the Institute.[2] The very difficult circumstances which the Project had to encounter, and survive, have been well documented, as has been the drafting process.[3] The purposes, form, and content of the Restatement (Third) are now being exhaustively examined, analyzed, and interpreted.[4] Indeed, some commentators, as a part of this process of dissection, are already looking ahead to what Falk has described as the

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1. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965).

2. *See* AMERICAN SOC'Y OF INT'L LAW, PROCEEDINGS, SEVENTY-NINTH ANNUAL MEETING 73–94 (1985) (contributions by A. M. Simon, Oscar Schachter, Jack M. Goldklang, Covey T. Oliver, Jonathan I. Chaney, Richard B. Lillich, S. Houston Lay, Dinah Shelton, Michael J. Bazyler, Samuel K. B. Asante, Elizabeth B. Impallomeni, David Small, Anne Bayetsky & Louis Henkin); Houck, *Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions*, 20 INT'L LAW. 1361 (1986).

3. Meessen, *Special Review Essays: The Restatement (Third) of the Foreign Relations Law of the United States*, 14 YALE J. INT'L L. 433 (1989); Falk, *Conceptual Foundations*, 14 YALE J. INT'L L. 439 (1989).

4. In addition to the series of Commentaries that are being published in THE INTERNATIONAL LAWYER (by Sir Joseph Gold, James R. Silkenat, and Brice M. Clagett and Daniel P. Poneman in Vol. 22, No. 1 (Spring 1988); Don Wallace, Jr. and Joseph P. Griffin in Vol. 23, No. 3 (Fall 1989); Monroe Leigh and Werner F. Ebke and Mary E. Parker in Vol. 24, No. 1 (Spring 1990); Richard Cunningham in Vol. 24, No. 2 (Summer 1990); Daniel T. Murphy in this issue; and others projected), reference should be made to *Special Review Essays: The Restatement (Third) of the Foreign Relations Law of the U.S.*, 14 YALE J. INT'L L. 433 (1989) (contributions by Karl M. Meessen, Richard A. Falk, Stefan A. Riesenfeld, Cecil J. Olmstead, Ruth Wedgwood, W. T. Burke, David D. Caron, Lung-Chu-Chen, William E. Holder, and Lea Brilmayer).

"next photo opportunity," that of the occasion of drafting the Restatement (Fourth).[5]

Although this Restatement (Third) does stand on the shoulders of its predecessors, it was acknowledged at a very early stage of the Project that certain topics, including most notably the law of the sea, would require "different and more extended restatement for the last decades of the twentieth century."[6] At the time of the inception of the Project, the Third United Nations Conference on the Law of the Sea (UNCLOS III) was moving into the most crucial phase of its negotiations on the way to the adoption, in 1982, of a Convention on the Law of the Sea. The Convention must now be regarded, whatever view one may take as to the status or merits of its disparate but closely interrelated parts, as representing the most sustained, most complex, and most ambitious attempt to restructure international law in modern times. The negotiations proceeded at the same time as the debates over Restatement formulations. The eventual shape of the UNCLOS III "package deal" was being crystallized, and the eventual "unity" of the 1982 Convention was being established, while the Project reporters and their advisers endeavored to select and appraise those topics within the general ambit of the law of the sea considered as necessary and appropriate for inclusion in Part V of the Restatement. The reporters were thus in the unenviable position of shooting at a rapidly moving target.

In 1965 the previous Restatement articulated, in its Introductory Notes, rules of law presented in black-letter type, and in the accompanying Comments and Reporters' Notes, the law of the sea primarily as reflected in the four conventions adopted by the First United Nations Conference on the Law of the Sea (UNCLOS I) at Geneva in 1958.[7] The United States became a party to each of the Geneva Conventions. UNCLOS III, negotiated between 1973 and 1982, came into existence partially because of the inadequacies inherent in the Geneva Conventions of 1958, but primarily because of expectations and influences that stemmed from a fundamentally transformed world community.[8] As the Secretary-General of the United Nations said when the 1982 Convention was opened for signature: "The convening of the Conference [UNCLOS III] set in motion not only a complex negotiating process at several levels but at the same

5. Falk, *supra* note 3, at 439–54.

6. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 3–4 (1986) [hereinafter RESTATEMENT (THIRD)]. Other topics identified in this way include diplomatic relations, international economic intercourse, dispute settlement, and cooperation in law enforcement.

7. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

8. *See* the pessimistic comments of the progenitor of UNCLOS III, Pardo, *An Opportunity Lost*, in LAW OF THE SEA 13–25 (B. Oxman, D. Caron & C. Buderi eds. 1983).

time an accelerated process of change in the conduct of States vis-à-vis the uses of the sea."[9]

At the Tenth Session of UNCLOS III, which was held in New York between March 9 and April 24, 1981, the Conference was confronted by the decision of the new United States administration to undertake a thorough review of the then draft Convention. Moreover, the new administration requested that the Conference should not complete its negotiations and proceed to the formalization of an official text of the Convention until the following year.[10] The United States did not effectively participate or negotiate in the Tenth (Resumed) Session of the Conference which was held in Geneva between August 3 and August 28, 1981. The Reagan administration did not complete its policy review until January 29, 1982,[11] and, when the Eleventh (and final) Session of the Conference opened in March 1982, it was agreed that there would be no significant changes in the official text of the draft Convention, which had been adopted at the close of the Tenth Session,[12] unless such changes enhanced the possibility of achieving consensus. After the publication of the United States' notorious "Green Book"[13] and the failure of efforts to bridge the gap between the United States and the Group of 77 over the deep seabed mining provisions of Part XI of the draft Convention, the Convention, together with Resolutions I–IV, was adopted by a recorded vote taken on April 30, 1982.[14]

The Convention was opened for signature in Montego Bay, Jamaica, on December 10, 1982.[15] At the time of this writing, it has attracted forty-two

9. Statement by Mr. Javier Perez De Cuellar, *printed in* THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, WITH ANNEXES AND INDEX xxix–xxxii, at xxx, U.N. Sales No. E. 83.V.5 (1983).

10. XVII R. PLATZÖDER, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS 268–70 (1988); *see also* Larson, *The Reagan Administration and the Law of the Sea*, 11 OCEAN DEV. & INT'L L. 297 (1982); Larson, *The Reagan Rejection of the UN Convention*, 14 OCEAN DEV. & INT'L L. 337 (1985).

11. Larson, *supra* note 10, 14 OCEAN DEV. & INT'L L. at 345–48.

12. This replaced the previous "informal text." *See* the recommendations of the Collegium (the collective name for the Officers of the Conference—the President of the Conference, the Chairmen of the Main Committees and the Rapporteur) in UN Doc. A/CONF.62/BUR.14 (1982).

13. *See also* Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 FOREIGN AFF. 1006-21 (1982); J. SEBENIUS, NEGOTIATING THE LAW OF THE SEA 81–96 (1984). Conditions for the United States' return to the UNCLOS III negotiations, as set out by President Reagan, appeared in U.S. Dep't of State, CURRENT POL'Y No. 371 (Jan./Feb. 1982).

14. U.N. Doc. A/CONF.62/SR.182 (1982); XVIII K. PLATZÖDER, *supra* note 10, at 138–39. The recorded vote on the adoption of the text produced 130 votes in favor to 4 against (Israel, Turkey, the United States, and Venezuela), with 17 abstentions (Belgium, Bulgaria, the Byelorussian S.S.R., Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, The Netherlands, Poland, Spain, Thailand, the Ukrainian S.S.R., and the United Kingdom). After the vote the delegation of Liberia requested the Secretariat to place on record that it had abstained from the vote.

15. United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122, Oct. 7, 1982, incorporating U.N. Docs. A/CONF.62/122/Corr.3, Nov. 23, 1982, and A/CONF.62/122/Corr.8, Nov. 26, 1982 [hereinafter Convention].

ratifications.[16] It will enter into force twelve months after the date of deposit of the sixtieth instrument of ratification or accession.[17] The United States announced its rejection of the Convention very soon after the Convention's adoption. Following a further brief policy review, President Reagan announced at meetings of the National Security Council on June 29 and July 9, 1982, "that the United States will not sign the Convention as adopted by the Conference, and our participation in the remaining Conference process will be at the technical level and will involve only those provisions that serve U.S. interests . . . ."[18] He did, however, add that the Convention "contains many positive and very significant points dealing with navigation and overflight, and most other provisions of the Convention are consistent with U.S. interests and, in our view, serve well the interests of all nations."[19]

The United States was represented at the Eleventh (and final) Session of UNCLOS III at Montego Bay, and it duly signed the Final Act signifying its participation in the Conference.[20] The United States has, however, consistently maintained that the deep seabed mining provisions of Part XI of the Convention are "hopelessly flawed"[21] and has adopted the view that, in present circumstances and with an inchoate Convention, deep seabed mining, beyond the limits of national jurisdiction, is permissible under international law and remains essentially one of the high seas freedoms.[22] Moreover, since the passage into law of the Deep Seabed Hard Mineral Resources Act of 1980,[23] the United States, while accepting that it does not seek to "assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed,"[24] has taken the lead in establishing the so-called "reciprocating States' regime," which purports to regulate deep seabed mining outside the Convention.[25]

When President Reagan issued his Proclamation of March 10, 1983,[26] on the establishment of an exclusive economic zone (EEZ), within which the United

16. As of Oct. 15, 1989. For details, see NEW DIRECTIONS IN THE LAW OF THE SEA Document U.3.A (K. Simmonds ed. 1990).

17. Convention, *supra* note 15, art. 308(1).

18. U.S. Dep't of State, *Law of the Sea and Oceans Policy,* CURRENT POL'Y No. 416 (July/Aug. 1982).

19. *Id.*

20. U.N. Docs. A/CONF.62/121, Oct. 27, 1982, incorporating U.N. Docs. A/CONF.62 /121/ Corr.3, Dec. 6, 1982, and A/CONF.62/121/Corr.7, Dec. 6, 1982. *See* the survey in RESTATEMENT (THIRD), *supra* note 6, pt. V, introductory note at 4–5.

21. WHITE HOUSE OFFICE OF POLICY INFORMATION, ISSUE UPDATE NO. 10, THE LAW OF THE SEA CONVENTION 8 (Apr. 15, 1983); *see also United States Ocean Policy,* 19 WEEKLY COMP. PRES. DOCS. 383 (Mar. 14, 1983).

22. RESTATEMENT (THIRD), *supra* note 6, § 523 & comment c.

23. 30 U.S.C. § 1401; Act of June 28, 1980, Pub. L. No. 96-283, 1980 U.S. CODE CONG. & ADMIN. NEWS (94 Stat. 553) (codified at 30 U.S.C. § 1401).

24. *Id.* § 1402(a)(2).

25. *See* Simmonds, *Deep Seabed Mining: The Protection of Pioneer Investment under the United Nations Preparatory Commission,* in PERESTROIKA AND INTERNATIONAL LAW 133–48 (W. Butler ed. 1990).

26. *United States Ocean Policy,* 19 WEEKLY COMP. PRES. DOCS. 383 (Mar. 10, 1983).

States intended to exercise sovereign rights over living and nonliving resources within 200 nautical miles from its coasts, he primarily recognized the force of the consensus that had emerged in UNCLOS III on the concept of the EEZ (to use the language of the Chamber of the International Court of Justice in the *Case Concerning Delimitation of the Maritime Boundary of the Gulf of Maine (Canada/United States)*[27]—a consensus that may "be regarded as consonant at present with general international law on the question."[28]) He was, however, careful to add that "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans . . . ."[29]

Although, in context, this statement referred only to the reciprocal recognition of interests with respect to navigational and overflight rights and freedoms, the Restatement (Third) reporters rashly advance the view that "by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep seabed mining, as statements of customary law binding upon them apart from the Convention."[30] Although the statement is accompanied by a series of derogations throughout the text of Part V of the Restatement (Third), it appears to be a dangerous over-simplification and it has been attacked as a "mistreatment of customary international law" and as reflecting "strongly the political thrust of the pronouncements about customary law issued by the Reagan Administration after it rejected the 1982 Convention . . . ."[31]

The Restatement (Third), like its predecessors, is practitioner-oriented and specifically attempts "to express the law as it would be pronounced by a disinterested tribunal, whether of the United States or some other national state or an international tribunal."[32] The American Law Institute's views on state practice as customary law and on the determination of the sources and the weight of the evidence as to whether or not rules or principles have become international law are set out in detail in the Introductory Note and in Part I, Chapter One, of the Restatement (Third).[33] They include the following statements: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation"[34] and "for customary law the 'best evidence' is proof of state practice, ordinarily by reference to official documents and other indications of governmental action."[35]

Even in a brief survey of Part V, such as is possible in the present article, it is therefore necessary to focus attention upon the reporters' perception and

27. 1984 I.C.J. 246

28. *Id.* at 294.

29. *United States Ocean Policy,* 19 WEEKLY COMP. PRES. DOCS. 383 (Mar. 10, 1983).

30. RESTATEMENT (THIRD), *supra* note 6, pt. V, introductory note at 5.

31. Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?,* 14 YALE J. INT'L L. 508, 527 (1989).

32. RESTATEMENT (THIRD), *supra* note 6, at xi.

33. *Id.* vol. 1, pt. I, ch. 1, at 16, 18–19, and §§ 102, 103 at 24, 35.

34. *Id.* § 102(2); *see also id.* comment b and reporters' note 2.

35. *Id.* § 103 comment a, second para.

articulation of the extent and content of customary law, as evidenced by the substantive provisions of the inchoate 1982 Convention or by state practice outside the Convention. The Restatement (Third), Part V,[36] covers (i) ships (including the nationality of ships and the rights and duties of the flag state);[37] (ii) rights and duties of coastal and port states (including rights in the territorial sea, the straits, the exclusive economic zone, the continental shelf, and the archipelagic waters);[38] and (iii) high seas (including high seas freedoms, exceptional jurisdiction on the high seas, and exploration and exploitation of the mineral resources of the deep seabed).[39] This commentary follows the sequence of presentation of topics adopted in the Restatement (Third) and offers selective comments in light of the central focus of attention indicated above.

A note of warning is definitely required, however. Part V of the Restatement (Third) clearly states the premise that:

> [T]he Convention as such is not law of the United States. However, many of the provisions of the Convention follow closely provisions in the 1958 conventions to which the United States is a party and which largely restated customary law as of that time. Other provisions in the LOS Convention set forth rules that, if not law in 1958, became customary law since that time, as they were accepted at the Conference by consensus and have influenced, and came to reflect, the practice of states.[40]

In spite of this statement there is, regrettably, little consistency of approach in Part V either as to where, in the reporters' views, the Convention does not reflect (or departs from) customary international law or where the Convention provisions are not applicable to the United States in the absence of specific United States adherence in practice. Although there are certain explicit references to these ends,[41] such references are notably by their absence in several important passages,[42] and, as has been noted above, the treatment of the bases and the content of customary law is often open to serious criticism.[43]

II. Ships

A. The Nationality of Ships

The Restatement (Third) sets out a black-letter rule in categorical terms that at once draws attention to the problems outlined above: "A ship has the nationality of the state that registered it and authorized it to fly the state's flag, but a state

36. *Id.* vol. 2, pt. V, introductory note and §§ 501–523 at 3–98.
37. *Id.* §§ 501, 502.
38. *Id.* §§ 511–517.
39. *Id.* §§ 521–523.
40. *Id.* pt. V, introductory note at 5.
41. *See, e.g., id.* § 502 comment f; § 511 reporters' note 8; § 514 comments b, j and reporters' notes 2, 4; § 515 comments a, b and reporters' note 1; and § 523 comment e and reporters' note 3.
42. *See, e.g.*, the commentary below, text at notes 50–55, following notes 63 & 77, and at notes 82–89, 97–103, 108–10, 117–24, 134–36, 150–56.
43. Burke, *supra* note 31, especially at 508–12.

may properly register a ship and authorize it to fly the state's flag only if there is a genuine link between the state and the ship."[44] The authority for this proposition is stated to be derived from Articles 5 and 6 of the 1958 Geneva Convention on the High Seas and from Articles 91 and 92 of the 1982 Convention. This commentary is not the place to retrace the long, and still unresolved, debate over the propriety of the term "nationality" to define the legal relationships between a state and a ship that is authorized by the state to fly its flag,[45] or the debate over the requirement of a "genuine link" between a ship and its flag state.[46] As O'Connell has clearly demonstrated, it is extremely difficult to attribute coherent meaning to the expression "nationality of a ship," and a "ship without nationality" is not necessarily a ship without law.[47] The failure over very many years to agree upon the connecting factors in nationality, and the consequent failure to resolve the controversy over the proliferation of "flags of convenience," was certainly *not* brought to an end by the adoption of either the 1958 or the 1982 texts. The Restatement (Third) makes reference to the attempts made in the 1986 United Nations Convention on Conditions for the Registration of Ships[48] to elaborate on the principle of the "genuine link," but does not disclose the conditions for registration or for the determination of a "genuine link" (which we must now call "open registry")[49] that were finally adopted in that Convention at the conclusion of a lengthy and contentious Conference that was convened under the auspices of UNCTAD.

The black-letter proposition here may possibly be said to represent a statement of majority world community expectations, but it does not present a rule that reflects the condition of contemporary customary international law nor do the Comments or Reporters' Notes present convincing authority in support of the proposition.[50] One may also doubt whether the proposition reflects current U.S. practice,[51] since differing legislative requirements in different states assert rights

44. RESTATEMENT (THIRD), *supra* note 6, § 501.

45. *See Summary Records of the 121st Meeting*, [1951] 1 Y.B. INT'L L. COMM'N 328–29, U.N. Doc. A/CN.4/42 (1951).

46. A landmark in this debate was the Advisory Opinion of the International Court of Justice given in *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization IMCO*, 1960 I.C.J. 150, and 1960 I.C.J. Pleadings 357, 365, 374, 404 (submissions of United Kingdom, The Netherlands, Norway, and Liberia); *see* Simmonds, *The Constitution of the Maritime Safety Committee of IMCO*, 12 INT'L & COMP. L.Q. 56–87 (1963).

47. II D. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 750–61 (I. Shearer ed. 1984).

48. Adopted Feb. 7, 1986; U.N. Doc. TD/RS/CONF.23, Mar. 13, 1986. This Convention was adopted by consensus (U.N. Doc. A/41/301, para. 3 (1986)), but will not come into effect until ratified by not less than forty states having registered vessels with a combined tonnage amounting to at least 25 percent of total world tonnage. *See* Convention, *supra* note 15, art. 19 & annex III.

49. Convention, *supra* note 15, arts. 4–8; *see also* Sturmey, *The United Nations Convention on Conditions for Registration of Ships*, 1987 LLOYDS MAR. & COM. L.Q. 97.

50. RESTATEMENT (THIRD), *supra* note 6, § 501 comment b and reporters' note 4.

51. Burke, *supra* note 31, at 518 (notes omitted), has acidly commented:

> The remarkable thing about this treatment is that one would never guess that it is a "restatement" of the law of the state which created the modern concept of flags of

of jurisdiction over ships on the ground of ownership or control by U.S. citizens, even when documented under foreign law and on the high seas.[52] Nationality is not dependent solely upon documentation, and there is no unique connection between the national identity of a ship for the purposes of jurisdiction and the flag flying.[53] Furthermore, the legal requirements in the United States with respect of the documentation of vessels[54] provide that a certificate of documentation is conclusive evidence of nationality for international purposes, but is not conclusive evidence of ownership in proceedings conducted under the laws of the United States.[55]

A new dimension to the underlying problems concerning "open registry" vessels has emerged in recent years in the European Community. A central feature of the Community's Common Fisheries Policy (CFP) (the basic elements of which were finally agreed to in January 1983 after over six years of negotiations)[56] is the establishment of total allowable catches (TACs) for the various stocks of fish found in the waters of Community Member States. Such TACs are then divided into quotas that are allocated periodically to individual Member States. Moreover, quotas can only be fished for by vessels having the nationality of the Member State within the appropriate allocation.[57] "Quota hopping" has become, in recent practice, a valuable appurtenance to a "flag of convenience" since, under the laws of some Member States, the conditions governing the acquisition of nationality for vessels are so flexible as to allow interests from another Member State (or from a third state outside the Community) to register vessels in their ownership under the flag of such "liberal" Member State.[58] These flexible conditions for the acquisition of nationality through vessel registration allow foreign-owned vessels to fish for quotas allocated to a Member State.

Ireland and the United Kingdom have suffered especially from the practice of "quota hopping," but the legislative measures they have adopted in order to

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convenience, which has most actively promoted the great ease of registry in particular nations, and whose nationals are still among the largest investors in vessels using such flags.

52. 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 732 (1940–44); 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 4 (1963–73).

53. The Muscat Dhows (Fr. v. Gr. Brit.), XI R. Int'l Arb. Awards 83 (Perm. Ct. Arb. 1905); III K. SIMMONDS, CASES ON THE LAW OF THE SEA app. 331–41 & 334–35 (1980).

54. 46 U.S.C.A. §§ 2101, 12101–12309 (West Pam. Supp. 1990).

55. *Id.* § 121104.

56. Simmonds, *The European Economic Community and the New Law of the Sea*, RECUEIL DES COURS ch. III (1990) (in the press); R.R. CHURCHILL, EEC FISHERIES LAW 1–50 (1987); the basic Community legislation is to be found in Reg. 170/83, O.J. (No. L 24/1), arts. 3 & 4 (1983), as amended.

57. Reg. 2241/87, O.J. (No. L 207/1), art. 11 (1987).

58. It is significant that in its original proposals for a Common Fisheries Policy, which were promulgated in 1966, the European Commission recommended the national legislation relating to the nationality of fishing vessels should be harmonized; J.O. 876 (1967).

counter it[59] have run into substantial difficulties as to their compatibility with various principles of Community law. The European Court of Justice has rendered a number of decisions, and other cases are currently pending.[60] It seems likely that Community law cannot, in its present condition, do more than restrain the practice of "quota hopping," and that in the longer term the future of the CFP may come to depend upon the replacement of national shipping registers in the twelve Community Member States by a single Community register and a single Community flag. The extent to which Community law may restrict the power that Member States currently have under international law to determine the conditions under which they will allow vessels to fly their flags is still not fully settled.[61] It would appear, however, that the 1986 United Nations Convention on Conditions for the Registration of Ships, which is not in force and which no Member State of the European Community has yet ratified, is incompatible with Community law, and that any Member States seeking to ratify that Convention would be required to do so by making a reservation in a form already recommended by the European Commission.[62]

In the pleadings in the current round of cases to which reference has been made, there are, of course, very frequent allusions to the *objectives* of articles 5 and 6 of the 1958 Geneva Convention on the High Seas and to articles 91, 92, and 94 of the 1982 Convention. These allusions are very similar in their language to the proposition contained in section 501 of the Restatement (Third). The *practice* of the states making these submissions, as evidenced in their national legislation to date, does not, however, indicate any general agreement on the connecting factors in nationality, the conditions of registration, or the rules for the determination of a "genuine link." The limitations superimposed by inter-

59. For Ireland, see Fisheries (Amendment) Act, 1983; Sea-Fishing Boats Regulations, 1986; and Case 223/86, Pesca Valentia Ltd. v. Minister for Fisheries and Forestry, Ireland, and the Attorney-General, [1988] E.C.R. 83. For the United Kingdom, see: British Fishing Boats Order 1983, S.I. 1983, No. 482; Sea Fish Licensing Order 1983, S.I. 1983, No. 1206; Merchant Shipping Act 1988, 1988 c. 12, esp. §§ 2, 13(2) & 14; and Merchant Shipping (Registration of Fishing Vessels) Regulations 1988, S.I. 1988, No. 1926.

60. Case 280/89, Commission v. Ireland, 32 O.J. (No. C 285/4) (1989) (decision pending); Case 93/89, Commission v. Ireland, 32 O.J. (No. C 107/18) 13 (1989) (decision pending); Case 3/87, R. v. Ministry of Agriculture, Fisheries and Food, *ex parte* Agegate Ltd., [1990] 1 C.M.L.R. 366; R. v. Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd. (not yet reported); Case 279/89, Commission v. United Kingdom, 32 O.J. (No. C 275/6) (1989) (decision pending); Case 221/89, R. v. Secretary of State for Transport, *ex parte* Factortame Ltd., 32 O.J. (No. C 211/13 (1989) (decision pending; for the judgment of the Divisional Court in England, see [1989] 2 C.M.L.R. 353); Case 246/89, Commission v. United Kingdom, 32 O.J. (No. C 229/6) (1989) (decision pending).

61. *But see* the Order for Interim Relief granted by the President of the European Court of Justice on Oct. 10, 1989, in Case 246/89, Commission v. United Kingdom, [1989] 3 C.M.L.R. 601. This Order was implemented in the United Kingdom through the Merchant Shipping Act 1988 (Amendment) Order 1989, S.I. 1989, No. 2006; *see* Simmonds, *supra* note 56, ch. III.

62. *See* COM (86) 523. Eight Member States of the European Community (Belgium, Denmark, Federal Republic of Germany, Italy, The Netherlands, Portugal, Spain, and the United Kingdom) have ratified the 1958 Geneva Convention on the High Seas, *supra* note 7; no Member State of the European Community has yet ratified the 1982 LOS Convention.

national law upon the right of states to decide for themselves under their municipal law[63] these connecting factors, conditions, and rules are still unclear and unsettled. The black-letter rule in section 501 of the Restatement (Third) is not reflective of the current condition of international law, nor of the current practice of the United States. It must also be noted that there is no evidence that the "genuine link" formula has had any substantial practical effect in inhibiting the growth of "open registry" shipping.

B. Rights and Duties of the Flag State

The Restatement (Third) section 502(1)(a) follows section 28(2) of the previous Restatement, but section 502 continues (in subsections (1)(b)(i) and (ii) and (2)) with provisions that were not covered by the previous Restatement. Section 502(1)(a) articulates the black-letter rule that "[t]he flag state is required to exercise effective authority and control over the ship in administrative, technical, and labor matters." Article 94 of the 1982 Convention, which refers to effective authority and control over "administrative, technical and *social* matters"[64] spells out a detailed, but nonexhaustive, list of measures to be taken by a flag state[65] in exercising this jurisdiction that goes beyond the Restatement (Third) proposition and its following Comment.[66] The situation where the coastal state may exercise concurrent jurisdiction over matters that are within the flag state's responsibility for the control of a ship when travelling through the territorial sea is dealt with in a later provision,[67] where the treatment of access to ports is open to serious criticism.[68] Article 20 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone was incorporated without change into article 28 of the 1982 Convention. Comment on the rights of a coastal state to control the entry of foreign vessels into its ports, and, more especially, on access to U.S. coastal waters and ports, is reserved until later in this article.[69]

The Restatement (Third) section 502(1)(b) goes on to add that the flag state is required:

> (i) to take such measures as are necessary to ensure safety at sea, avoid collisions, and prevent, reduce and control pollution of the marine environment, and
> (ii) to adopt laws and regulations and take such other steps as are needed to conform these measures to generally accepted international standards, regulations, procedures, and practices, and to secure their implementation and observance.

63. Lauritzen v. Larsen, 345 U.S. 571, 584 (1953).
64. Convention, *supra* note 15, art. 94(1) (emphasis added).
65. *Id.* art. 94(2), (3) & (4); *see also* arts. 108(2), 109(3)(a) & 113. Compare the general principles set out in the 1958 Geneva Convention on the High Seas, *supra* note 7, art. 5(a).
66. Restatement (Third), *supra* note 6, § 502 comment b and reporters' note 1.
67. *Id.* § 512 and reporter's notes 5 & 7.
68. *Infra* text at notes 86–89; Burke, *supra* note 4, at 520–22.
69. *Infra* text at notes 88–89.

Frequent reference to the applicability of *generally recognized* "international regulations, practices and procedures"[70] to "international rules or standards,"[71] or to "international standards"[72] is an innovative and controversial characteristic of the 1982 Convention. These references are made in a wide variety of contexts in addition to those alluded to in the language of section 502(1)(b)(ii)[73] and are applied especially to the laws and regulations of a coastal state relating to innocent passage in the territorial sea, to transit passage in straits, to archipelagic sea lanes passage, or to the construction, operation, and utilization of artificial islands and similar structures in the EEZ. Above all, such references have attracted widespread attention in their use in certain of the 1982 Convention provisions on the prevention, reduction, and control of vessel-source pollution.[74]

The 1982 Convention establishes general principles and policies that seek to govern the prevention, reduction, and control of pollution of all kinds throughout the entire marine environment. The allocation of specific rights and the imposition of specific burdens varies according to the source, the location, and the type of pollution involved. The Convention is intended to be compatible with, and complementary to, the principal existing multilateral treaties and to provide a framework upon which future sectoral agreements can rest. Yet, the Convention does not adopt a uniform stance on the regulation of all sources of pollution. The effect of the 1982 Convention's pollution provisions is ambulatory, and, since the treaties vary in their requirements, and the parties to them also vary, the point of reference is ambiguous. As O'Connell has said:

> If it is always the latest Convention that is to be that point of reference, then a novel system of legislative repeal has been devised, the effect of which would be to render older treaties automatically inoperative when their standards have been changed by later ones, and that would be an innovation in treaty law, which it is doubtful that customary law could achieve of its own mechanics.[75]

It is unfortunate that the Restatement (Third) does not, either in the Comment or the Reporters' Notes, indicate the criteria for "general acceptance" or identify (with one exception[76]) the treaties from which are derived what the reporters

70. Convention, *supra* note 15, arts. 21(4), 39(2), 41(3), 53(8), 94(2)(a), & 94(5).

71. Convention, *supra* note 15, arts. 21(2), 211(2), 211(5), 211(6)(c), & 226(1)(a).

72. *Id.* arts. 60(3), 60(5) & 60(6).

73. Which attempts in composite form to refer to the Convention, *supra* note 15, arts. (94)(4)(c), 94(5), 192, 194, 211, 217 & 219; *but cf.* the language of the 1958 Geneva Convention on the High Seas, *supra* note 7, arts. 5(1), 10, 11, 24 & 25.

74. Boyle, *Marine Pollution under the Law of the Sea Convention*, 79 AM. J. INT'L L. 347, 353–54 (1985); Van Reenen, *Rules of Reference in the New Convention on the Law of the Sea*, 12 NETH. Y.B. INT'L L. 3 (1981); D. Vignes, *La valeur juridique de certaines règles, normes ou pratiques mentionnées au TNCO comme "généralement acceptées,"* 1979 ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL 712; Simmonds, *supra* note 56, ch. IV.

75. II D. O'CONNELL, *supra* note 47, at 997.

76. International Convention for the Safety of Life at Sea, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, with Protocol Relating to the 1974 International Convention for the Safety of Life at Sea, 1978,

describe as "the broader obligation" that "has become binding on all flag states as a matter of customary international law."[77] It is true that the use of rules of reference in the Convention is far from satisfactory. The treatment of this subject in the Restatement (Third) adds weight to the view that a substantial level of discretion still remains for the flag state to interpret, prescribe, and apply pollution standards and obligations. Again, the reader is given no real guidance as to the practice of the United States or of other flag states that have refused to ratify or apply the relevant international conventions, but that, at least in theory, have indicated that they are prepared to accept the Convention's compromise formulations on rules of reference.

III. Rights and Duties of Coastal and Port States

A. The Territorial Sea

The Restatement (Third) uses the phrase "zones of adjacent sea" when dealing with the authority exercised by a coastal state over the territorial sea, over passage through the territorial sea, over straits and archipelagic waters, over the EEZ, and over the continental shelf.[78] As expected, the Restatement (Third) relies very heavily on language used in the 1982 Convention[79] (itself drawn in part from the formulations adopted in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone[80]), but scant attention is paid to *the delimitation of baselines*. Unexpectedly, there is only a very brief reference to the considerable body of jurisprudence in the United States where the Supreme Court has applied the language of the 1958 Convention on baselines to litigation over the delimitation of federal and state boundaries.[81]

More significantly, the Restatement (Third) does not address the very difficult questions provoked by the substantial variations in state practice over the use of straight baselines. The weaknesses of the existing prescriptions, in both the 1958 and the 1982 Conventions,[82] have been amply illustrated in the valuable series of studies produced by The Geographer of the State Department.[83] In a recent overall survey of high authority, Prescott has written:

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32 U.S.T. 5577, T.I.A.S. No. 10009. Restatement (Third), *supra* note 6, vol. 2, pt. V, introductory note 7, and § 502 comment c and reporters' note 2.

77. Restatement (Third), *supra* note 6, § 502 reporters' note 2.

78. *Id.* § 511.

79. Convention, *supra* note 15, arts. 2(1), 3, 5, 55, 57 & 76.

80. 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, *supra* note 7, arts. 1(1), 3 & 5.

81. Restatement (Third), *supra* note 6, § 511 comment d and reporters' notes 3, 4 & 5.

82. Convention, *supra* note 15, art. 7; 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, *supra* note 7, art. 4; *see* I D. O'Connell, *supra* note 47, at 199–218.

83. Especially illuminating is the series Limits in the Seas, in particular, nos. 103 Colombia (1985), 99 Vietnam (1983), 42 Ecuador (1972), and 14 Burma (1970).

> There is no point in making an exhaustive analysis of the range of meanings which can be attached to the terms . . . [articulated in article 7 of the 1982 Convention] . . . because there is not the slightest evidence that the majority of coastal states is interested in more precise definition of any of these terms. Agreement on the rules quoted was reached very early in the United Nations Conference on the Law of the Sea. That is not surprising because the imprecise language would allow any coastal country, anywhere in the world, to draw straight baselines along its coasts.[84]

The writer is aware of over fifty cases in which states have drawn straight baselines along all or part of their coasts and of a further fifteen cases in which states have adopted enabling legislation, but have not yet published the delimitation. In over half of these cases there are major departures from the prescriptions in the 1958 and 1982 Conventions.[85] It is true that the Restatement (Third) does make allusions to the concessive character of article 4 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party, but the failure of the Restatement (Third) to deal adequately with the meaning and/or status of article 7 of the 1982 Convention, either in general or in U.S. practice, is both confusing and disturbing in light of what follows in sections 511–517.

By contrast, the vexed question of the right of *access of foreign vessels to the ports of a coastal state* is given extensive coverage,[86] but the discussion is at the least tendentious and at the worst misleading. As this feature of the Restatement (Third) has already been the subject of a very well argued critical analysis by Burke,[87] only a brief reference is necessary here. Does such a right exist in customary international law as the Restatement (Third) asserts? Burke has convincingly argued that the evidence presented in the Restatement (Third) to support the proposition that a general right of access does exist, in time of peace and for merchant vessels, is unconvincing both doctrinally and in the light of state practice. One of the most recent comprehensive scholarly treatments of the subject, by Kasoulides, confirms the earlier view of Lowe,[88] that, in the absence of treaty law, the presumption that the international ports of a state are open to international merchant traffic had *not* acquired the status of a right, except only for vessels in distress seeking safety.[89]

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84. J.R.V. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 52, 54–55, 63–66, 67–70 & 313–18 (1985); *see* D. JOHNSTON, THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING 114 (1988).

85. Some examples are printed in the collection of documents in NEW DIRECTIONS IN THE LAW OF THE SEA, *supra* note 16, pt. c. *See also* the discussion in J.R.V. PRESCOTT, *supra* note 84, at 52, 54–55, 65–70, 163–67, 215–16, 237–41, 259–64, 278–80, 296–98 & 336–38.

86. RESTATEMENT (THIRD), *supra* note 6, § 512 comment c and reporters' notes 3 & 4.

87. Burke, *supra* note 31, at 520–22.

88. G. KASOULIDES, PORT STATE CONTROL AND JURISDICTION (in the press); Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 SAN DIEGO L. REV. 597 (1977).

89. *See* the "test of distress" laid down by Sir William Scott in The Eleanor, 1809 Edw. 135, 165 Eng. Rep. 1058 (1809) and the annotation to the reprint of this case in I K. SIMMONDS, CASES ON THE LAW OF THE SEA 98–138 (1976).

B. Passage through the Territorial Sea, Straits, and Archipelagic Waters

Article 16(4) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provided that "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." This formulation has been described as "[a] codification which failed to cover the most significant categories of straits."[90] It did, of course, alter the existing law for the parties to that Convention, and it brought into the regime of straits the other provisions of the Convention relating to the regime of innocent passage through the territorial sea.[91] It was clear long before the opening of the UNCLOS III negotiations that the debate over passage through straits would have a very different focus. The fundamental compromise in all of the UNCLOS III negotiations set the maximum breadth of the territorial sea at a distance of twelve nautical miles from the baselines of a coastal state; all of the other interlocking compromise arrangements, which together make up the 1982 Convention, rest upon that. The threat of enclosure within double the new territorial sea limits of over 130 straits led to prolonged debate over the *characterization* of the waters within straits[92] in the light of rapidly changing interests.

The major maritime powers sought to protect their economic interests by securing adequate guarantees for commercial passage through international straits. Moreover, the superpowers, from the outset, were determined that their strategic and security interests, in particular with respect to the global deployment of nuclear submarines, would not be adversely affected by the expansion of the jurisdictional rights of the states flanking such straits.[93]

The two new legal rights of passage eventually agreed upon in the 1982 Convention sought to accommodate these conflicting economic, security, and environmental interests. The new regime of *transit passage*[94] through international straits allows for the exercise of a limited freedom of navigation (and of overflight) between one area of the high seas, or an economic zone, and another, or in order to enter or leave a port of a flanking state. This right of passage cannot

90. I D. O'Connell, *supra* note 47, at 316. It was directed primarily toward securing a right of access to the Israeli port of Eilat through the Straits of Tiran, which were under Arab control at that time.

91. 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, *supra* note 7, arts. 14–23.

92. *See* Anand, *Transit Passage and Overflight in International Straits*, 26 Ind. J. Int'l L. 72 (1986); Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 Am. J. Int'l L. 77 (1980).

93. Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 Am. J. Int'l L. 48–76 (1980).

94. Convention, *supra* note 15, arts. 38(2), 38(3), 39(1)(a), 39(1)(b), 40, 42, & 44.

be suspended for security or for other reasons, and it extends to all vessels and aircraft, military and commercial. *Archipelagic sea lanes passage*[95] is very similar to transit passage through straits, and the rights duties of flag states and of the archipelagic state are the same, mutatis mutandis, as the rights and duties of flag states and of straits states in respect of transit passage. Other provisions in the 1982 Convention do, however, give straits states additional jurisdictional authority in respect of control of pollution both in their territorial seas and in their straits.[96] This additional authority does *not* extend to the new regime of archipelagic waters and thus to the 1982 Convention provisions on archipelagic sea lanes passage.

Each of these two new regimes gives the coastal state less control over passing vessels than does the regime of innocent passage through the territorial sea. Neither affords the same freedom of navigation to such vessels as would have been the case if the waters concerned had been part of the high seas. The Restatement (Third) here generally adopts the position that the rights of transit passage secured under the provisions of the 1982 Convention reflect the current condition of customary international law,[97] and one Comment asserts that "[r]ecent practice of states, supported by the broad consensus achieved at the Third United Nations Conference on the Law of the Sea, has effectively established as customary international law *the concept and the basic rules* of transit passage through international straits and sea-lanes passage through archipelagic waters."[98]

That assertion is highly questionable, and it is unsupported in the Restatement (Third) by evidence of recent practice.[99] It is clear that certain states bordering some straits of particular importance to international navigation have granted explicit rights of this kind and other flanking states have either acquiesced in such passage or have accepted that such passage was indeed transit passage. During the passage of the Territorial Sea Act 1987[100] through the Parliament of the United Kingdom it was specifically announced that rights *equivalent* to a right of passage would be afforded in the Strait of Dover and in certain other straits adjoining the United Kingdom. Examples of such an explicit grant of rights are, however, infrequent, and in the series of specialist studies on the major international straits of the world, currently being produced under the editorship of Gerard J. Mangone,[101] most of the evidence produced suggests that the regime

95. *Id.* arts. 53(1), 53(4).
96. *Id.* arts. 220, 233.
97. RESTATEMENT (THIRD), *supra* note 6, § 513(2)(a), (b) comments j & k and reporters' notes 3 & 4.
98. *Id.* § 513 comment j (emphasis added).
99. Burke, *supra* note 31, at 513–15.
100. *See* 484 PARL. H.L. DEB. col. 382 (Hansard Feb. 5, 1987).
101. The series began with W. BUTLER, NORTHEAST ARCTIC PASSAGE (1978). Subsequent volumes include: M. LEIFER, MALACCA, SINGAPORE AND INDONESIA (1978); R. RAMAZANI, THE PERSIAN GULF

of innocent passage is applicable, although in a very few cases the regime of transit passage may more closely approximate the actual practice of states. That practice is nevertheless often unclear or ambivalent; it cannot be said in any way to justify the categorical claim made in the Restatement (Third) that state practice since the 1982 Convention has generated a right of transit passage in customary law. The ability to exercise rights of transit passage through international straits remains, of course, a matter of the greatest importance for the United States, and it is understandable that her government should consistently claim that such rights exist in international law. For the Restatement (Third) to adopt a similar stance, without adequate analysis of actual practice, is at best misleading and likely to arouse criticism as to motive as well as to argument.[102]

A similar comment may be made with respect to the treatment in the Restatement (Third) of *the right of warships to innocent passage in the territorial sea.* The core of the continuing controversy here was identified by Elihu Root as counsel for the United States in the *North Atlantic Coast Fisheries* arbitration in 1910: "War-ships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass, because they do not threaten."[103]

The League of Nations Codification Conference, which met at The Hague in 1930, produced a text that provided: "As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification."[104] The text put forward by the International Law Commission, which was considered in UNCLOS I in Geneva in 1958, recognized that many states did in practice require prior authorization and/or notification and proposed that these conditions be written into the Geneva Convention.[105] In the event the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone contained no express provision on the matter but its article 14(1) provided: "Subject to the provisions of these articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea." Since 1958 very differing conclusions have been drawn, both by ratifying and nonratifying states, as to the meaning and scope of this provi-

AND THE STRAIT OF HORMUZ (1979); S. TRUVER, THE STRAIT OF GIBRALTAR AND THE MEDITERRANEAN (1980); R. LAPIDOTH-ESCHELBACHER, THE RED SEA AND THE GULF OF ADEN (1982); G. ALEXANDERSSON, THE BALTIC STRAITS (1982); L. CUYVERS, THE STRAIT OF DOVER (1986); C. PARK, THE KOREAN STRAITS (1988). *See* W. BUTLER, *supra,* at 137–43; M. LEIFER, *supra,* at 86–104; S. TRUVER, *supra,* at 159–83; G. ALEXANDERSSON, *supra,* at 81–85; R. LAPIDOTH-ESCHELBACHER, *supra,* at 146–49; L. CUYVERS, *supra,* at 46–54; C. PARK, *supra,* at 75–76.

102. Burke, *supra* note 31, at 514–15.

103. XI NORTH ATLANTIC COAST FISHERIES ARBITRATION PROCEEDINGS 2007; IV K. SIMMONDS, *supra* note 89, at 157.

104. *Report of the First Sub-Committee,* League of Nations Doc. C.230 M.117 1930 V, art. 12, at 5, 6; *see also* Doc. C.351(b) M.145(b) 1930 V, at 217.

105. [1952] II Y.B. INT'L L. COMM'N 42; [1953] II *id.* at 74; [1954] I *id.* at 6, 99, 160–62; [1955] I *id.* at 143–48; [1956] I *id.* at 212–15; and [1956] II *id.* at 30, 31.

sion. Since it appears in the 1958 Convention under the rubric "Rules applicable to all ships" some have claimed that the right is enjoyed by warships as well as by merchant vessels; this is the position adopted in the black-letter formulation in the Restatement (Third) and in the accompanying Comment,[106] although the Reporters' Note does indicate the substantial dissent from this view that was evident in the negotiations in UNCLOS III.[107]

In practice neither the "right" of innocent passage of warships in the territorial sea, nor the "requirement" of prior authorization or notification, are settled either by the language of the provision in the 1958 Geneva Convention or by that of the 1982 Convention, which in the end adopted the 1958 formulation and left the matter essentially unresolved.[108] In state practice, direct confrontation over this issue has usually been avoided, although, of course, certain of the major naval powers, including the United States, continue more or less consistently to deny the legality of a "requirement" of prior authorization or notification for passage when such appears in the legislation of coastal states. The admission of warships into the territorial sea has been relegated, in consequence of the failure to resolve the matter in the three codification attempts of the past sixty years, to the evolution of customary law. The United States did not succeed, in spite of the conjunction of NATO and Warsaw Pact interests, in securing the acceptance of a right of passage at UNCLOS III.[109] The negotiations in UNCLOS III have, however, advanced the debate over the *conduct of the passage of warships* when admitted to the territorial sea, since the identification of conduct that renders passage noninnocent does now, in the formulation used in the 1982 Convention, apply to all vessels, whether merchant ships or warships.[110]

C. Exclusive Economic Zone

In its Comment on the black-letter proposition concerning the regime of the EEZ, the Restatement (Third) claims:

> Recent practice of states, supported by the broad consensus achieved at the Third United Nations Conference on the Law of the Sea, has effectively established as customary law the concept of the exclusive economic zone, the width of the zone (up to 200 nautical miles), and the basic rules governing it . . . . Some of the detailed provisions in the Convention, however, do not reflect customary law (as of 1987) and

106. Restatement (Third), *supra* note 6, § 513(1)(a) & comment h.

107. *Id.* § 513(1)(a) reporters' note 2.

108. Convention, *supra* note 15, art. 17; I D. O'Connell, *supra* note 47, at 289–93; Burke, *supra* note 31, at 515–16.

109. *See* the language used in art. 29(2) of the *Informal Single Negotiating Text;* UNCLOS III, III Official Records 183, 192, 196 & 203 (1975); I R. Platzöder, *supra* note 10, at 20–40, 21.

110. Convention, *supra* note 15, art. 19. D. O'Connell, in the writer's view, correctly asserts that "To the extent that State practice warrants the view that warships enjoy the right of innocent passage, that catalogue concerns the mode of passage of warships." I D. O'Connell, *supra* note 47, at 292.

> will be binding only when the Convention comes into effect and only on states parties to the Convention.[111]

Two points arise immediately from this assertion and from the language used in the black-letter proposition. First, the concept of the exclusive economic zone, as negotiated in UNCLOS III and articulated in the 1982 Convention, is that of a *separate, but functional, maritime zone*, situated between the territorial sea and the high seas. Articles 55 and 86 of the 1982 Convention, and their negotiating history, make it clear that this maritime zone does *not* have a residual high seas character, as is suggested by the language of section 514(2),[112] nor does it have a residual territorial sea character. The extension of coastal states' sovereign, jurisdictional, and other rights to the EEZ, as it is expressed in article 56(1)(a)(b) and (c) of the 1982 Convention,[113] rested upon an uneasy compromise in the creation of a maritime zone that is truly sui generis.

The second point concerns the presentation of the detailed regime of the EEZ in the Restatement (Third). There is a wide-ranging review of the principal rights and duties of coastal states, and of other states, that are applicable in the zone as they are set out in the 1982 Convention.[114] There is no discussion of the formula provided in the 1982 Convention[115] for the attribution and regulation of other rights in the EEZ that do not fall either within the rights of coastal states or those of "other states" as they are identified in article 58. These "unattributed rights," which may concern such diverse matters as aspects of the military uses of the sea, the recovery of historic wrecks beyond the contiguous zone, and certain aspects of marine scientific research, are likely to become of increasing importance.[116]

Again, however, the assertions with respect to the current condition of customary law as applied to the regime of the EEZ give the most cause for concern. What *are* the "basic rules" of the regime that are "effectively established as customary law," and what *is* the nature of the state practice that illustrates them in operation? The Restatement (Third) falls far short of giving a convincing

111. RESTATEMENT (THIRD), *supra* note 6, § 514 comment a; *see also id.* § 514 comment j & reporters' notes 1 & 2. *See* Convention, *supra* note 15, arts. 56, 58.

112. Which reads:

> All states enjoy, *as on the high seas,* the freedoms of navigation and overflight, freedom to lay submarine cables and pipelines, and the right to engage in other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships and aircraft. (Emphasis added.)

See also RESTATEMENT (THIRD), *supra* note 6, § 514 comment b, § 521 comment a.

113. *Cf.* the language used in President Reagan's Proclamation (of Mar. 10, 1983) establishing an exclusive economic zone of the United States; 83 DEP'T ST. BULL., No. 2075, at 71 (1983); NEW DIRECTIONS IN THE LAW OF THE SEA, *supra* note 16, Document F.1.

114. RESTATEMENT (THIRD), *supra* note 6, § 514 comments c-i.

115. Convention, *supra* note 15, art. 59.

116. As possible examples, compare the limitations of the prescriptions in Convention, *supra* note 15, arts. 58 & 60, in their application to underwater listening devices; *id.* art. 303, on the recovery of historic wrecks *within* the contiguous zone; and *id,* arts. 246(3) & 246(5) on the implied distinction between "pure" and "applied" marine scientific research in the EEZ.

answer to either of these questions. Most of the claims to an EEZ that have so far been made refer to articles 56 and 58 of the 1982 Convention,[117] but many claims have not yet been supported by detailed regulations, except for fisheries. Some states, most notably Canada, Japan, and the United Kingdom, have preferred to claim an exclusive fishing zone (EFZ) rather than an EEZ.[118] In the legislation already promulgated there is considerable evidence of substantial divergence from the 1982 Convention prescriptions. This, given the convoluted history of the emergence of the concept of the EEZ and the welter of complementary, overlapping, and indeed, contradictory proposals debated during UNCLOS III, is perhaps hardly surprising, but it is not reflected in the pages of the Restatement (Third).[119]

Nevertheless, the absence of material protest in the face of almost eighty unilateral claims by coastal states, strongly suggests that the *right* to a 200-nautical-mile EEZ has become part of customary international law, as is asserted in the Restatement (Third). This view is supported by the somewhat vague language used in the judgment of the International Court of Justice in the *Libya/Malta Continental Shelf* case in 1985: "[it is] . . . incontestable that . . . the exclusive economic zone . . . is shown by the practice of States to have become a part of customary law."[120]

Even if it is argued that the provisions of articles 56 and 58 of the 1982 Convention have passed in their entirety into customary law—a view that this writer does not accept—it cannot be argued that the various obligations imposed upon the coastal state in that Convention in respect to the exercise of jurisdictional rights over fisheries, pollution, and marine scientific research have been generally assumed as part of customary law.[121] Although it appeared at the conclusion of UNCLOS III that relatively few developing countries would be, contrary to earlier general expectations, among the major beneficiaries of the EEZ concept, some—Indonesia is a prominent example—will gain from the EEZ maritime resources that are more substantial than their land resources.[122] Yet in many cases the delimitation of the outer limits of the EEZ has not yet been

117. *See, e.g.*, Documents C.1 (Vanuatu), C.5 (Equatorial Guinea), C.32 (Mauritania), C.33 (Brazil), C.34 (Tanzania), F.3 (Indonesia), F.6 (Gabon), in NEW DIRECTIONS IN THE LAW OF THE SEA, *supra* note 16.

118. *See* K. SIMMONDS, *supra* note 56, ch. III *passim*. The United States and the U.S.S.R. are among the states that originally claimed a 200-nautical-mile EFZ, but have subsequently amended their claims to a 200-nautical-mile EEZ; *see* NEW DIRECTIONS IN THE LAW OF THE SEA, *supra* note 16, Documents F.1 & F.2.

119. I D. O'CONNELL, *supra* note 47, at 552–69, gives an excellent concise account of the genesis of the EEZ and of the conflicting forces at work in its evolution.

120. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya, Malta) 1985 I.C.J. 13, 33.

121. I D. O'CONNELL, *supra* note 47, at 559–81.

122. H. Djaal, National Interests at Sea and National Development 1–3, 4, 11–15 (1989). This unpublished paper was presented to an international conference in August 1989, and has been made available to the writer; the author is Head of the Agency for Research and Development, Department of Foreign Affairs, Republic of Indonesia.

determined, nor has there been substantial progress towards either the clarification or the settlement of rights of access of neighboring landlocked or geographically disadvantaged states to the surplus of the living resources of the EEZ of a coastal state.[123] The EEZ compromise at UNCLOS III was intended to secure for coastal states the right to control the conservation and management of economic resources, especially living resources, in their adjacent seas. The developing states expected that the exercise of that right would lead to a major redistribution of ocean resources.[124] The current practice of states suggests that it is far too early to pronounce with any degree of certainty, as does the Restatement (Third), on either the nature or the extent of the application of particular rules of the regime that are set out in the 1982 Convention and that provide for inter alia, the determination of total allowable catches by the coastal state, questions of access to (and allocation of) surplus stocks, control over pollution, rights of navigation and overflight, and interrelationships between the regimes of the EEZ and of the continental shelf.

D. THE CONTINENTAL SHELF

The very considerable difficulties encountered during the UNCLOS III negotiations in attempts to reach agreement on the legal definition of the extent of the continental shelf, and on the legal powers exercisable with respect to it, have been well documented.[125] What emerged in article 76(1) of the 1982 Convention[126] was a legal definition of the shelf that stands apart from any geographic definition. The new rules on the EEZ necessarily implied that a limit of at least 200 nautical miles from the baselines of a coastal state would mean that in some regions areas of the seabed lying beyond the limits of the *physical* continental margin would be brought within national jurisdiction. Interest since the adoption of the 1982 Convention has understandably focused upon areas where the physical continental margin (the shelf, slope, and rise, but excluding the deep ocean floor with its oceanic ridges)[127] extends beyond 200 nautical

123. *See generally* the selection of documents in NEW DIRECTIONS IN THE LAW OF THE SEA, *supra* note 16, pts. C & F.

124. Alexander & Hodgson, *The Impact of the 200 Mile Economic Zone on the Law of the Sea,* 12 SAN DIEGO L. REV. 569–99 (1975); Burke, *National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea,* 9 OCEAN DEV. & INT'L L. 289 (1981); Juda, *The Exclusive Economic Zone and Ocean Management,* 16 OCEAN DEV. & INT'L L. 305–31 (1987).

125. I D. O'CONNELL, *supra* note 47, at 467–509.

126. *See* Convention, *supra* note 15, art. 76(1), which reads:

> The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

127. *Id.* art. 76(3).

miles from the baselines. The 1982 Convention provides alternative formulae[128] (all unsatisfactory) for the delimitation by the coastal state of the outer edge of the continental margin in such cases. It also imposes a maximum extent for such delimitation of either 350 nautical miles seaward of the baselines or the 200 metre isobath.[129]

The Restatement (Third) broadly adopts the 1982 Convention definition[130] and claims that this has been implicitly accepted by the United States and is "now accepted as customary law."[131] It does not address the more difficult question of state practice with respect to the exercise of the prescribed sovereign rights of coastal states for the purpose of exploring and exploiting the natural resources of the shelf beyond 200 nautical miles from the baselines.[132] The UNCLOS III negotiations ended with a compromise between the so-called "margineers" (the broad-margin states) and those states that sought a revenue-sharing arrangement in return for conceding to coastal states the right to exploit mineral resources in their shelves between 200 and 350 nautical miles seaward of the baselines. The compromise is reflected in the language of article 82 of the 1982 Convention and "payments or contributions in kind" will have to be made by such coastal states (after the first five years of production) to the International Sea Bed Authority (ISBA) that is to be established under the 1982 Convention.[133] The failure to produce evidence of state practice in support of the very generalized propositions advanced in the Restatement (Third) may, here again, reflect the U.S. preferences and expectations,[134] but in practice, very few states to date have either articulated or attempted to exercise sovereign rights in the margin beyond 200 nautical miles from their baselines. This is in no small measure because of the complex problems left unresolved by the 1982 Convention definition of the continental shelf. As Prescott has shown,[135] the determination of the direction and extent of the natural prolongation of a state's territory is highly controversial. That controversy has recently been deepened because the International Court of Justice discounted the structural, geological, and morphological evidence on natural prolongation that was presented to it in the *Libya/Tunisia Continental Shelf Case*.[136]

128. *Id.* art. 76(4)(a), (b).

129. *Id.* art. 76(5), (6); *see also* Annex II to the Final Act of UNCLOS III, which contains an exception to these rules with respect to the establishment of the outer edge of the continental margin in the southern part of the Bay of Bengal. On submarine ridges only the 350-nautical-mile limit applies.

130. RESTATEMENT (THIRD), *supra* note 6, § 511(c) and reporters' note 8. *But cf.* § 515 comment a.

131. *Id.* § 511 reporters' note 8.

132. Burke, *supra* note 31, at 522–23.

133. RESTATEMENT (THIRD), *supra* note 6, § 515 comment a, § 523 reporters' note 3.

134. Burke, *supra* note 31, at 523.

135. J.R.V. PRESCOTT, *supra* note 84, at 96–103.

136. 1982 I.C.J. 18. Note especially on this point the dissenting opinions of Judges Gros, Oda, and Evensen, *id.* at 143, 157, and 278, respectively.

IV. Exploitation of Mineral Resources of Deep Seabed

Many who consult Part V of the Restatement (Third), and certainly most foreign observers, will turn with the greatest interest to its articulation of rights with respect to the exploration and exploitation of ocean floor minerals beyond the limits of national jurisdiction. That articulation is not surprising, in view of the developments in U.S. policy since the late 1960s, but it is necessary nonetheless to review it with circumspection. The Restatement (Third) puts forward the black-letter rule in these terms:[137]

(1) Under international law,
   (a) no state may claim or exercise sovereignty or sovereign or exclusive rights over any part of the seabed and subsoil beyond the limits of national jurisdiction, or over its mineral resources, and no state or person may appropriate any part of that area;
   (b) unless prohibited by international agreement, a state may engage, or authorize any person to engage, in activities of exploration for and exploitation of the mineral resources of that area, provided that such activities are conducted
      (i) without claiming or exercising sovereignty or sovereign or exclusive rights in any part of that area, and
      (ii) with reasonable regard for the right of other states or persons to engage in similar activities and to exercise the freedoms of the high seas;
   (c) minerals extracted in accordance with paragraph (b) become the property of the mining state or person.

(2) Under the law of the United States, a citizen of the United States may engage in activities of exploration for, or exploitation of, the mineral resources of the area of the seabed and subsoil beyond the limits of national jurisdiction only in accordance with a license issued by the Federal Government pursuant to law or international agreement.

Burke has demonstrated[138] the inconsistencies between the language of section 523(1)(a)[139] and that of the United States Deep Seabed Hard Mineral Resources Act of 1980,[140] which established what purported to be an interim program to regulate the exploration for, and commercial recovery of, hard mineral resources of the deep seabed beyond the limits of national jurisdiction by U.S. citizens.[141] The Restatement (Third), consistently with various U.S. policy declarations over

137. RESTATEMENT (THIRD), *supra* note 6, § 523; *see also id.* comments a–f and reporters' notes 1–5.

138. Burke, *supra* note 31, at 525–26.

139. *See also* RESTATEMENT (THIRD), *supra* note 6, § 523 comment b.

140. Pub. L. No. 96–283, 94 Stat. 553, codified as amended principally at 30 U.S.C. §§ 1401 *et. seq.* (1982); *see* 30 U.S.C. § 1413(a)(2)(E)(ii) (1986).

141. *See* 30 U.S.C. § 1403(14) (1986).

the years,[142] seeks to establish analogies between the freedom of fishing on the high seas and that of deep seabed mining:

> Although there are important differences between mining and fishing operations, *under customary international law the resources of the sea-bed, like the fish in the waters above, may be taken by anyone, provided no claim is made to sovereign or exclusive rights over any area of the sea or sea-bed.*[143]

Yet, when President Koh in his formal statement at the conclusion of UNCLOS III addressed this question, he used the following words:

> Speakers for every regional and interest group expressed the view that the doctrine of the freedom of the high seas can provide no legal basis for the grant by any State of exclusive title to a specific mine site in the international area of the sea-bed. Many are of the view that article 137 of the Convention has become as much a part of customary international law as the freedom of navigation.[144]

Since then, the Preparatory Commission, which was charged under the 1982 Convention with special responsibility for the establishment of the institutions of the Convention—the International Sea Bed Authority (ISBA) and the International Tribunal for the Law of the Sea—has had occasion to pronounce on the matter in response to protests over the issuance of licenses by the United States National Oceanic and Atmospheric Administration (NOAA) and by the Governments of the United Kingdom and the Federal Republic of Germany under their national legislation.[145] On August 30, 1985, the Preparatory Commission adopted a Declaration asserting that claims incompatible with the Convention regime for deep seabed mining "shall not be recognized [and] were illegal."[146] On April 11, 1986, the Preparatory Committee adopted a further Declaration, this time by vote, which rejected any claim, agreement, or action that was incompatible with the Convention and its related Resolutions as "wholly illegal and devoid of a basis for the creation of legal rights."[147]

Whatever view one may adopt as to the juridical status of these Declarations, it is clear that at the least they maintain and reinforce the views of the great majority of the 121 states that submitted concluding statements at the end of UNCLOS III, and that the position adopted in the Restatement (Third) cannot be said to reflect the current consensus of views in the international community as

142. It will be recalled that the United States rejected from the outset the "moratorium" Resolution of the General Assembly adopted in 1969; *Question of the Reservation Exclusively for Peaceful Purposes of the Seabed and the Ocean Floor,* G.A. Res. 2574D, 24 U.N. GAOR, Supp. (No. 30) at 11, U.N. Doc. A/7834 (1969).

143. RESTATEMENT (THIRD), *supra* note 6, § 523 comment b (emphasis added); *see also id.* § 523 reporters' note 2, and the language used in the Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1401(a)(12).

144. U.N. Doc. A/CONF.62/17, at 136 (1984).

145. Simmonds, *supra* note 25, at 136–38.

146. *Declaration Adopted by the Preparatory Commission,* U.N. Doc. LOS/PCN/72 (1985); *reprinted in* NEW DIRECTIONS IN THE LAW OF THE SEA, *supra* note 16, Document M.2.

147. U.N. Doc. LOS/PCN/78. This Declaration was adopted by a vote of 59 to 7, with ten abstentions.

to unilateral claims by states to grant and exercise rights of exploration and exploitation of deep seabed mineral resources. Sohn has claimed that "[a] universally recognized legal regime governing the exploitation of the mineral resources of the deep seabed beyond the zones of national jurisdiction does not exist at the present time,"[148] and, in one significant passage, Restatement (Third) advances the view that:

> When the LOS Convention comes into effect, it will bind the parties to that Convention; *if it is accepted by nations of the world generally, without dissent by an important group of states,* the sea-bed mining regime of the Convention may become effective also as customary international law for nonparties.[149]

Earlier, in its exposition of the sources of international law, the Restatement (Third) described customary international law as resulting from "a general and consistent practice of states followed by them from a sense of legal obligation,"[150] but in the following Comment adds that: "in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures. Historically, such dissent and consequent exemption from a principle that became general customary law has been rare."[151]

The principle here in question is that of the juridical status of the deep seabed beyond the boundaries of national jurisdiction. The system established under the 1982 Convention for the administration of the exploration and exploitation of the mineral resources of the ISBA is quite another matter. Is section 523(1)(b) of the Restatement (Third), quoted above, truly reflective of current international law as to the juridical status of the deep seabed, and is the current U.S. practice, as encapsulated in section 523(2), consistent with the condition of customary international law? The concept of the "common heritage" of mankind, as it was applied to the resources of the deep seabed in article 136 of the 1982 Convention, derives from many sources, but, in particular, from: (i) the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, of 27 January, 1967;[152] (ii) the Agreement Concerning the Activities of States on the Moon and Other Celestial Bodies, of 5 December, 1979;[153] (iii) the General Assembly "Moratorium Resolution";[154] and (iv) the General Assembly "Common Heritage Declaration."[155] Within the context of the 1982 Convention the concept has, at the barest minimum, led not only to general acceptance of the view that deep

148. L. SOHN & K. GUSTAFSON, THE LAW OF THE SEA 172 (1984).

149. RESTATEMENT (THIRD), *supra* note 6, § 523 comment e (emphasis added); *see also id.* § 102 comment f.

150. *Id.* § 102(2).

151. *Id.* § 102 comment d; *see also id.* § 102 reporters' note 2.

152. 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (1967).

153. *International Cooperation in the Peaceful Uses of Outer Space,* U.N. Doc. A/34/664 (Nov. 12, 1979).

154. Resolution 2574-D, 24 U.N. GAOR, Supp. (No. 30) at 11, U.N. Doc.A/7630 (1969).

155. Resolution 2749 (xxv), 25 U.N. GAOR, Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970).

seabed polymetallic nodules are res communis—things belonging to all—but also to dispute over the modalities of their accessibility.

The formulation of the black-letter rule in section 523(1)(b) of the Restatement (Third) contains a reaffirmation of the U.S. policy position that the resources of the deep seabed are res nullius, whereas the formulation of the basic rule in section 523(1)(a), which follows the language of article 137 of the 1982 Convention, necessarily depends on the premise that those resources are res communis. This fundamental contradiction persists, without explanation, throughout the ensuing Comments and Reporters' Notes. It underlies, of course, the policies of the United States and of the other states involved with the "reciprocating states' regime." The concept of the "common heritage of mankind," even in what Pardo has described as its flawed rendering in the 1982 Convention,[156] has at least led us to fill a jurisdictional void even if it has currently not convinced certain states that following this concept can lead to an ordered, equitable and feasible system of access to the management of resources.

V. Conclusion

The appearance of a new Restatement arouses a variety of expectations in the international community.[157] It is, by virtue of its provenance and the process of its drafting, immediately seen as a unique source of evidence—both within and without the United States—as to the current condition of international law and to the expected conduct of the United States in relating to that condition. Part V of the Restatement (Third) cannot, however, in a number of very important areas, some of which have been mentioned in this Commentary, be turned to with confidence as an authoritative doctrinal expression of that condition at large or even of the particular practice of the United States. Various reasons have been advanced for these weaknesses. It is unfortunate, although hardly surprising, that the United States Government became involved in the drafting process of the "Foreign Relations Project."[158] Burke, at the end of his very perceptive analysis of Part V, has concluded that: "It seems likely that the purpose of the *Restatement* was to try to avoid or attenuate the potentially costly effects of the misjudgment of the Reagan Administration on the Law of the Sea Convention, but this effort is misguided and misplaced."[159] That is a harsh criticism, but it is very clear that the shadow of the so-called "ideological stand-off"[160] that produced and followed the Reagan rejection of the 1982 Convention, does fall heavily over

156. Pardo, *supra* note 8, at 21.

157. Meessen, *supra* note 3, at 433–35.

158. The postponement of the adoption of the Draft was secured at the request of the Departments of State and Justice in 1985; *see* AMERICAN LAW INSTITUTE, PROCEEDINGS, SIXTY-SECOND ANNUAL MEETING 374–85 (1985).

159. Burke, *supra* note 31, at 527.

160. Simmonds, *The International Regulation of Deep Seabed Mining III*, 11 OIL & GAS L. & TAX'N REV. 306, 310 (1987–88).

Part V of the Restatement (Third) and has contributed to its ambivalence and obliquity.

The selectivity of the Reporters' approach to the provisions of the inchoate 1982 Convention rests upon the assessment of the content of, and the relationships between, established and emerging customary international law and the "new" law of the Convention. They fail, however, to demonstrate the "interplay of equities" on which its comprehensiveness and cohesiveness seeks a foundation. For the 1982 Convention, which in the writer's view has many disfiguring flaws, amounts to very much more than the sum of its parts. The 1982 Convention emphasizes, and indeed depends upon, a recognition of the close interrelationships between the varying uses of ocean space. Its adoption should be seen as the beginning of a long process to secure the flexible and equitable accommodation of exclusive and inclusive uses of the marine environment as a whole. It is, as one of its most influential negotiators and draftsmen has said: "as much a daring venture of international politics and international relations as an exercise in international law."[161]

The ideological, policy, and pragmatic reasons for the rejection of the 1982 Convention by the United States are well-known. It was perhaps to be expected, in the wake of that rejection, that the Reporters would, in the Restatement (Third), seek, in their analysis of customary law, state practice that would underpin those propositions in the 1982 Convention that advance U.S. interests. They have, however, gone far beyond that. Their treatment of customary law is too often arbitrary, selective, and internally inconsistent. As a result, Part V of the Restatement (Third), in spite of its formidable antecedents, must be used with the greatest circumspection.

161. Jens Evensen, in a paper presented to the symposium on Denuclearization of the Oceans, sponsored by the Myrdal Foundation and Pacem in Maribus XIII, Norrtelje, Sweden, May, 1984. Ambassador Evensen, a Vice-President of UNCLOS III, was one of the principal architects of the "parallel system of mining" for the resources of the ISBA that is reflected in the provisions of Part XI of the 1982 Convention.